

## Me, Myself, and My Avatar: The Right to the Likeness of Our Digital Selves

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**Abstract:** This note discusses the problems and issues arising out of the extension of publicity rights to our digital likenesses—our avatars. It begins, in Part II, by explaining the scope of an individual's right to publicity. Next, Part III discusses what it means to have an avatar and whether publicity rights should extend to a player's avatar. Social scientists have shown that players in online games become highly attached to their characters, to the extent that their online representations become extensions of themselves. These games also create dynamic societies in which characters are motivated to interact and work together. As these virtual communities become larger, more popular, and more lucrative, the potential for commercial abuses of a player's digital likeness become very real.

Part IV of this note identifies two potential invasions of privacy associated with our digital likeness: (1) violations of the publicity right and (2) mass information gathering from individual gamers. Finally, Part V of this work addresses how federal copyright law might preempt the publicity right in the arena of online gaming.

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## I. INTRODUCTION

The publicity right (also known as the “right to likeness”) is an extension of the right to privacy, and is defined as “[t]he right to control and to choose whether and how to use an individual's identity for commercial purposes.”<sup>1</sup> In this note, the statutory right to likeness is expounded upon in the light of its potential application in the area of massively multiplayer online role-playing games, or MMORPGs—games that “allow players to interact with each other and explore a world in real-time 3-D graphics” while “[e]very player is represented by a customizable character.”<sup>2</sup>

The issue at the heart of this note is whether players can, now or in the future, expect to have publicity rights over their avatars. Given current gaming technology, a publicity right in a player's avatar is unlikely. However, as technology progresses towards photorealistic animation, players' publicity rights claims may be strengthened. Given the strong attachment players have to their avatars and the dynamic communities that exist in the virtual world, an extension of publicity rights to avatars can only be a positive development for online privacy. Avatars not only represent a player's physical presence in a virtual world, but are also a means of tracking and profiling individual patterns of socialization, consumption, and entertainment. As one scholar recently wrote:

These virtual worlds have emerged in the form of electronic communities or complex online multiplayer games. These virtual worlds and communities do not require technology for full body submersion within the virtual experience; instead, a user can create a fully three-dimensional person (and radically new virtual

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<sup>1</sup> 765 ILL. COMP. STAT. ANN. 1075/10 (2009). *See also* OHIO REV. CODE ANN. § 2741.01(D) (West 2009) (“‘Right of publicity’ means the property right in an individual's persona to use the individual's persona for a commercial purpose.”); TENN. CODE ANN. § 47-25-1103(a) (West 2009) (“Every individual has a property right in the use of that person's name, photograph, or likeness in any medium in any manner.”); TEX. PROP. CODE ANN. § 26.002 (Vernon 2009) (“An individual has a property right in the use of the individual's name, voice, signature, photograph, or likeness after the death of the individual.”).

<sup>2</sup> Nick Yee, *The Labor of Fun: How Video Games Blur the Boundaries of Work and Play*, 1 GAMES & CULTURE 68, 68 (2006), available at [http://www.nickyee.com/pubs/Yee%20-%20Labor%20of%20Fun%20\(2006\).pdf](http://www.nickyee.com/pubs/Yee%20-%20Labor%20of%20Fun%20(2006).pdf).

bodily and personal identity) in the 3D virtual world, through which he can live, work, and play.<sup>3</sup>

## II. WHAT IS THE PUBLICITY RIGHT?

The right of publicity seeks to protect a person's "name, voice, signature, photograph, or likeness" from non-consensual commercial exploitation.<sup>4</sup> The right of publicity should not be confused with claims brought under the Lanham Act, which protects individuals against "false endorsement," a claim analogous to the publicity right.<sup>5</sup> Some courts distinguish the right of publicity from the tort of misappropriation in that the former does not focus on the harm to the plaintiff; rather it focuses on monetary deprivation.<sup>6</sup>

Publicity rights were originally protected by common law tort actions and have since been codified in numerous states' statutes.<sup>7</sup> Generally, the statutes protect a person's likeness when it is "readily identifiable"<sup>8</sup> and its use is non-incidental.<sup>9</sup> Additionally, in order to

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<sup>3</sup> Jonathon W. Penney, *Privacy and the New Virtualism*, 10 YALE J.L. & TECH. 194, 221 (2008).

<sup>4</sup> CAL. CIV. CODE § 3344(a) (West 2009). Some states define the right more broadly: for example, in Indiana, the publicity right protects personality, and "'personality' means a living or deceased natural person whose: (1) name; (2) voice; (3) signature; (4) photograph; (5) image; (6) likeness; (7) distinctive appearance; (8) gesture; or (9) mannerisms; has commercial value, whether or not the person uses or authorizes the use of the person's rights of publicity for a commercial purpose during the person's lifetime." IND. CODE ANN. § 32-36-1-6 (West 2009).

<sup>5</sup> 15 U.S.C. § 1051 et seq.; *McBee v. Delica Co., Ltd.*, No. 02-198-P-C, 2004 WL 2634465, at \*3 (D. Me. Aug. 19, 2004); *Alvarez Guedes v. Marcano-Martinez*, 131 F. Supp. 2d 272, 278 (D.P.R. 2001) (noting that right of publicity is not a Lanham Act claim). The purpose of the Lanham Act is to protect consumers from being misled by a false representation that a celebrity was sponsoring a product or service. *Id.*

<sup>6</sup> *Curran v. Amazon.com, Inc.*, No. 2:07-0354, 2008 WL 472433, at \*3 (S.D.W. Va. Feb. 19, 2008). Other courts do not recognize this distinction. *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 413-14 (9th Cir. 1996); *Lane v. Random House*, 985 F. Supp. 141, 145-46 (D.D.C. 1995).

<sup>7</sup> Right of Publicity Statutes, <http://righttopublicity.com/statutes> (last visited April 8, 2010).

<sup>8</sup> *E.g.*, CAL. CIV. CODE § 3344(b)(1) (West 2009).

<sup>9</sup> *E.g.*, CAL. CIV. CODE § 3344(c) (West 2009); *see Williams v. Newsweek, Inc.*, 63 F. Supp. 2d 734, 737-38 (E.D. Va. 1999), *aff'd*, 202 F.3d 262 (1999), *cert. denied*, 530 U.S. 1279

violate an individual's right of publicity, the use must be for a commercial purpose.<sup>10</sup> Consent to use a person's likeness for a commercial purpose is an affirmative defense to a right of publicity claim.<sup>11</sup>

In some states, the right of publicity terminates at death.<sup>12</sup> In many other states, "a right of protection from appropriation of some element of an individual's personality for commercial exploitation, [sic] does not terminate upon death."<sup>13</sup> Treating the right of publicity as a property right (of sorts),<sup>14</sup> such states find that the publicity right is "freely transferable, assignable, and licensable, in whole or in part."<sup>15</sup> This means that the right to likeness may be licensed, gifted, or transferred by will or trust.<sup>16</sup> If a person dies without transferring his or her publicity right, some states regulate how the right will descend in the person's family.<sup>17</sup> Even after transference and

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(2000) (finding that the photo of the unidentified "buddy" posing with the author who was the subject of an article was an incidental use of the "buddy's" likeness).

<sup>10</sup> 765 ILL. COMP. STAT. ANN. 1075/5 (West 2009). "Commercial purpose" means the public use or holding out of an individual's identity (i) on or in connection with the offering for sale or sale of a product, merchandise, goods, or services; (ii) for purposes of advertising or promoting products, merchandise, goods, or services; or (iii) for the purpose of fundraising." Some courts have found that a plaintiff must show a value in his or her likeness being associated with the item of commerce in order to prevail. *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 624 (6th Cir. 2000).

<sup>11</sup> *E.g.*, OHIO REV. CODE ANN. § 2741.02(B) (West 2009). A person can also be said to consent when silent about how he or she wishes his or her likeness to be used. *Miller v. American Sports Co.*, 237 Neb. 676, 679-80 (Neb. 1991) (finding that a model who did not restrict the use of her likeness could not complain when photographs of her were used to imply she was a prostitute).

<sup>12</sup> *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 586 (2d Cir. 1990) (citations omitted); *Abernathy v. Thornton*, 83 So. 2d 235 (Ala. 1955).

<sup>13</sup> *E.g.*, KY. REV. STAT. ANN. § 391.170(1) (West 2009).

<sup>14</sup> In some cases, the publicity right is not recognized as a property right. *Hanover Ins. Co. v. TMP Int'l, Inc.*, No. 4:04CV668 RWS, 2006 WL 176105, at \*2 (E.D. Mo. 2006) (finding that the right of publicity is an "intangible property right" and cannot be treated identical to actual property rights).

<sup>15</sup> *E.g.*, WASH. REV. CODE ANN. § 63.60.030(1) (West 2009); TENN. CODE ANN. § 47-25-1103(b) (West 2009).

<sup>16</sup> *E.g.*, IND. CODE ANN. § 32-36-1-16 (West 2009).

<sup>17</sup> *E.g.*, OHIO REV. CODE ANN. § 2741.04 (West 2009); TEX. PROP. CODE ANN. § 26.005(a) (Vernon 2009).

alienation, the typical right of publicity statute extinguishes the right a fixed number of years after a person's death—typically fifty years.<sup>18</sup>

A person whose right of publicity has been violated may bring an action in court for actual or statutory damages,<sup>19</sup> or “reasonable royalty.”<sup>20</sup> Punitive damages may be awarded for willful violations.<sup>21</sup> If appropriate, a court may grant injunctive relief in the form of “temporary restraining orders, preliminary injunctions, [or] permanent injunctions.”<sup>22</sup> Many states also authorize the awarding of reasonable attorney's fees, court costs, and expenses to the prevailing party.<sup>23</sup> Several states allow a court to impound materials made in violation of a person's publicity right,<sup>24</sup> and if the plaintiff prevails, four states allow a court to order the destruction of offending materials.<sup>25</sup> One state even allows the court to order the defendant to give a public apology or issue a retraction.<sup>26</sup> Only four states, though, have chosen to create a criminal standard parallel to the civil right of

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<sup>18</sup> *E.g.*, 765 ILL. COMP. STAT. ANN. 1075/30(b) (West 2009) (50 years); KY. REV. STAT. § 391.170(2) (50 years); OHIO REV. CODE ANN. § 2741.02(A) (60 years) (West 2009); FLA. STAT. ANN. § 540.08(5) (West 2009) (40 years). One state terminates the right ten years after a person's death. TENN. CODE ANN. § 47-25-1104(b)(2) (West 2009) (10 years). Two states extend the right for a full hundred years. IND. CODE ANN. § 32-36-1-8(a) (West 2009) (100 years); OKLA. STAT. ANN. tit. 12, § 1448(G) (West 2009).

<sup>19</sup> *E.g.*, CAL. CIV. CODE § 3344(a) (West 2009); IND. CODE ANN. § 32-36-1-10 (West 2009).

<sup>20</sup> *E.g.*, FLA. STAT. ANN. § 540.08(2) (West 2009).

<sup>21</sup> *E.g.*, 765 ILL. COMP. STAT. ANN. 1075/40(b) (West 2009); VA. CODE ANN. § 8.01-40(A) (West 2009).

<sup>22</sup> *E.g.*, 765 ILL. COMP. STAT. ANN. 1075/50. *See* RESTATEMENT (SECOND) OF TORTS § 936 (1979). Injunctive relief may or may not be appropriate depending on the nature of the interest the court is protecting, the relative hardship likely to result to the defendant if an injunction is granted and to the plaintiff if it is denied, the interests of third persons and of the public, the practicability of framing and enforcing the order or judgment, and several other factors.

<sup>23</sup> *E.g.*, 765 ILL. COMP. STAT. ANN. 1075/55 (West 2009).

<sup>24</sup> IND. CODE ANN. § 32-36-1-14(b) (West 2009); OHIO REV. CODE § 2741.07(D)(4); WASH. REV. CODE ANN. § 63.60.060(4) (West 2009).

<sup>25</sup> IND. CODE ANN. § 32-36-1-15(b) (West 2009); TENN. CODE ANN. § 47-25-1106(c) (West 2009); WASH. REV. CODE ANN. § 63.60.060(4) (West 2009); OHIO REV. CODE ANN. § 2741.07(E) (West 2009).

<sup>26</sup> UTAH CODE ANN. § 76-9-407(4) (West 2009).

action, though a criminal violation of a person's right of publicity is a misdemeanor<sup>27</sup> in each of the four jurisdictions.<sup>28</sup>

Many legislatures have chosen to immunize media conduits who innocently publish solicitations or advertisements in violation of an individual's right of publicity, including "newspapers, magazines, radio and television networks and stations, cable television systems, billboards, and transit ads."<sup>29</sup> In order to benefit from this immunity, however, these companies must have unknowingly violated a person's publicity right.<sup>30</sup>

States have generally recognized that protecting the right of publicity naturally implicates First Amendment rights to free speech and expression. Accordingly, many statutes limit the scope of the publicity right by recognizing certain expressive exemptions.<sup>31</sup> The first exemption allows the use of an individual's likeness "in connection with the broadcast or reporting of an event or topic of general or public interest."<sup>32</sup> While the news outlets are *not* given

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<sup>27</sup> A misdemeanor is "[a] crime that is less serious than a felony and is usu[ally] punishable by fine, penalty, forfeiture, or confinement (usu[ally] for a brief term) in a place other than prison (such as a county jail)." BLACK'S LAW DICTIONARY 1089 (9th ed. 2004).

<sup>28</sup> N.Y. CIV. RIGHTS § 50 (West 2009); TENN. CODE ANN. § 47-25-1105(b) (West 2009) (class A misdemeanor); UTAH CODE ANN. § 76-9-407(2) (West 2009) (class B misdemeanor); VA. CODE ANN. § 18.2-216.1 (West 2009) (misdemeanor with minimum fine of \$50, maximum of \$1,000).

<sup>29</sup> CAL. CIV. CODE § 3344(f) (West 2009); OKLA. STAT. ANN. tit. 12, § 1448(L) (West 2009).

<sup>30</sup> *Id.*; 42 PA. CONS. STAT. ANN. § 8316(d) (West 2009); OHIO REV. CODE ANN. § 2741.02(E) (West 2009); NEV. REV. STAT. ANN. § 597.810(2) (West 2009); TEX. PROP. CODE ANN. § 26.012(c) (Vernon 2009); *see also* WASH. REV. CODE ANN. § 63.60.070(4) (West 2009) (media conduit cannot be liable for violation of publicity right in advertising "unless the advertisement or solicitation was intended to promote the medium itself.").

<sup>31</sup> Some states take a more belt-and-suspenders approach to the Constitutional problem. *E.g.*, OHIO REV. CODE ANN. § 2741.09(B) (West 2009) (declaring that the right of publicity "does not affect rights or privileges recognized under the Ohio Constitution or United States Constitution."); OHIO REV. CODE ANN. § 2741.09(A)(6) (West 2009); WIS. STAT. ANN. § 995.50(3) (West 2009) ("The right of privacy recognized in this section shall be interpreted in accordance with the developing common law of privacy, including defenses of absolute and qualified privilege, with due regard for maintaining freedom of communication, privately and through the public media.").

<sup>32</sup> OHIO REV. CODE ANN. § 2741.09(A)(3) (West 2009); *see also* NEB. REV. STAT. § 20-202(1) (2009). The news exception permits use of an individual's likeness when reporting on matters of "public interest," unless there is no relationship between the likeness and the "news" is really an advertisement. *Messenger v. Gruner and Jahr Printing and Publ'g*, 208 F.3d 122, 124 (2d Cir. 2000), *cert. denied*, 531 U.S. 818 (2000).

First Amendment immunity from tort liability under *Branzburg v. Hayes*, most states exempt news outlets from liability for breaching the right of publicity.<sup>33</sup> Even though the First Amendment does not require states to immunize news outlets under *Branzburg*, there is a strong public interest in creating such an exemption — namely for the news media to furnish access to information so that the public might sift through and find the truth.<sup>34</sup> This is not something states wish to stifle. Similarly, some states exempt political campaigns from liability for violating the right of publicity.<sup>35</sup>

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<sup>33</sup> 408 U.S. 665, 682-83 (1972). *See also* *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-70 (1991) (finding that newspapers can be made subject to tort laws of general applicability). For a discussion of the First Amendment right to gather information, *see* Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards A Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249 (2004).

<sup>34</sup> Robert Schmuhl and Robert G. Picard, *The Marketplace of Ideas*, in *THE INSTITUTIONS OF AMERICAN DEMOCRACY: THE PRESS* 141, 146-47 (Geneva Overholser and Kathleen Hall Jamieson, eds., 2006); *Abrams v. U. S.*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.").

<sup>35</sup> *E.g.*, OHIO REV. CODE ANN. § 2741.02(D)(2) (West 2009); CAL. CIV. CODE § 3344(d) (West 2009); 765 ILL. COMP. STAT. ANN. 1075/35(b)(2) (West 2009); OKLA. STAT. ANN. tit. 12, § 1449(D).

The protection of political speech is at the core of the First Amendment, and the Supreme Court has often afforded it the highest protection. *E.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347-48 (1995). There are a plethora of other exceptions to the publicity right that are not relevant here. NEV. REV. STAT. ANN. § 597.790(3) (West 2009) (exception for government agency); N.Y. CIV. RIGHTS § 51 (exception for licensing of sound recording); OHIO REV. CODE ANN. § 2741.09(A)(5) (West 2009) (higher education exception); WASH. REV. CODE ANN. § 63.60.070(6) (West 2009) (de minimis exception); NEV. REV. STAT. § 597.790(2)(g) (West 2009) (promotion of state tourism exception); OKLA. STAT. ANN. tit. 12, § 1449(C) (West 2009) (employment exception); TENN. CODE ANN. § 47-25-1107(a) (West 2009) (fair use exception); MASS. GEN. LAWS ANN. ch. 214, § 3A (West 2009) (author or composer identification exception); *Christianson v. Henry Holt and Co., LLC*, No. 06-cv-1156, 2007 WL 2680822, at \*2-3 (C.D. Ill. June 29, 2007) (attempt to claim "fine art" exception); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 968-69 (10th Cir. 1996) (parody cards do not infringe on players' publicity rights).

### III. AVATARS & PUBLICITY RIGHTS: WHY SHOULD WE CARE?

At the heart of this note is whether, under the current legal environment, a player can expect to own the right of publicity in his or her MMORPG characters or avatars. In addressing this issue, the question of whether players should have publicity rights in their avatars also arises.

#### A. DO PLAYERS HAVE PUBLICITY RIGHTS IN THEIR AVATARS AND CHARACTERS?

As a practical matter, players do not have publicity rights in their avatars or characters. This issue has not been decided by courts or legislatures, but rather by the game makers such as Blizzard (the makers of *World of Warcraft*) or Linden Labs (the makers of *Second Life*). In order to play any of the major MMORPGs, players must waive any rights they have in their characters. For example, in order to create an account and play *World of Warcraft*, players are subject to “clickthrough” or “clickwrap” agreements<sup>36</sup> such as terms of service (“TOS”) and end-user license agreements (“EULA”). Blizzard’s *World of Warcraft* agreement requires players to concede that “[a]ll title, ownership rights and intellectual property rights in and to the Game and all copies thereof (including without limitation any . . . characters, character names, . . . character inventories, . . . character likenesses, . . . moral rights . . . ) are owned or licensed by Blizzard.”<sup>37</sup> Each game

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<sup>36</sup> A “clickthrough” or “clickwrap” agreement is a “kind of online software license agreement” that “presents the user with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon. The product cannot be obtained or used unless and until the icon is clicked.” *Specht v. Netscape Communs. Corp.*, 306 F.3d 17, 22 n. 4 (2d Cir. 2002).

<sup>37</sup> *World of Warcraft End-User License Agreement*, part 4A - Ownership, <http://www.worldofwarcraft.com/legal/eula.html> (last visited April 8, 2010). Similarly, in order to play *Age of Conan* (a game similar to *World of Warcraft*), players must agree that all right, title, interest, license and intellectual and other property rights in and to the Game and all copies or other reproductions thereof (including, without limitation, . . . characters, character names, stories, dialog, catch phrases, . . . character, . . . character likenesses, . . . ) are exclusively owned or licensed by Funcom . . . This Agreement grants You no rights to use such content . . . You may not transfer or otherwise assign all or any portion of your rights, duties or obligations under this Agreement to any person.

*Age of Conan End-User License Agreement*, part 3 - Intellectual Property Rights, <http://support.ageofconan.com/article.php?id=171> (last visited April 8, 2010); *see also* *The Sims 3 End-User License Agreement*, part 2A, <http://www.simprograms.com/the-sims-3-eula-for-retail-game> (last visited April 8, 2010).



service will have different terms based on the services it offers, but the clickthrough agreements are largely similar to one another.<sup>38</sup>

Clickthrough agreements are not always enforceable because they are contracts of adhesion, which are sometimes considered too unconscionable to enforce.<sup>39</sup> In order for these agreements to be unenforceable, they must be both procedurally and substantively unconscionable. Procedural unconscionability occurs where there is impropriety during contract formation; substantive unconscionability occurs where a part of the contract is one-sided or overly harsh.<sup>40</sup> If any part of the contract is unconscionable, a court may (1) refuse to enforce the contract in its entirety, (2) enforce the contract less the unconscionable terms, or (3) limit the application of a term as to avoid an unconscionable result.<sup>41</sup> The judge will determine whether all or

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<sup>38</sup> For example in *Second Life*, the game seeks to foster a more creative environment than fantasy adventure games such as *World of Warcraft*. *Second Life*, The Creations, <http://secondlife.com/whatis/creations.php> (last visited April 8, 2010). In order to do this, the *Second Life* terms of service allow players to retain certain intellectual property rights over the content they create in-game. *Second Life Terms of Service*, part 3.2, <http://secondlife.com/corporate/tos.php> (last visited April 8, 2010) (“you will retain any and all applicable copyright and other intellectual property rights with respect to any Content you create using the Service”). However, this is subject to the fact that Linden Lab, the creators of *Second Life*, owns user accounts: “[y]ou agree that even though you may retain certain copyright or other intellectual property rights with respect to Content you create while using the Service, you do not own the account you use to access the Service, nor do you own any data Linden Lab stores on Linden Lab servers (including without limitation any data representing or embodying any or all of your Content). Your intellectual property rights do not confer any rights of access to the Service or any rights to data stored by or on behalf of Linden Lab.” *Id.* at 3.3. Further, “you agree to grant to Linden Lab a royalty-free, worldwide, fully paid-up, perpetual, irrevocable, non-exclusive, sublicensable right and license to exercise the copyright, *publicity*, and database rights you have in your account information, including any data or other information generated by your account activity, in any media now known or not currently known.” *Id.* (emphasis added).

<sup>39</sup> “A contract or clause is procedurally unconscionable if it is a contract of adhesion. A contract of adhesion, in turn, is a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it. Under California law, the critical factor in procedural unconscionability analysis is the manner in which the contract or the disputed clause was presented and negotiated. When the weaker party is presented the clause and told to ‘take it or leave it’ without the opportunity for meaningful negotiation, oppression, and therefore procedural unconscionability, are present.” *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 605-606 (E.D. Pa. 2007) (citations and internal quotation marks omitted).

<sup>40</sup> *In re RealNetworks, Privacy Litig.*, 2000 WL 631341, at \*5 (N.D. Ill. 2000).

<sup>41</sup> RESTATEMENT (SECOND) OF CONTRACTS: Unconscionable Contract or Term § 208 (1981).

any part of a clickthrough agreement is unconscionable in light of all the material facts,<sup>42</sup> including the setting, purpose, and effect of the contract.<sup>43</sup> It is only by looking at the totality of the circumstances that clickthrough agreements can be deemed unconscionable and therefore unenforceable.<sup>44</sup>

For example, in *Bragg v. Linden Research*, a player sued Linden Labs—the company that operates *Second Life*—over a virtual property transaction.<sup>45</sup> Linden sought to enforce a mandatory arbitration clause in its terms of service.<sup>46</sup> The court found the mandatory arbitration clause unconscionable for six reasons: (1) the TOS gave Linden absolute power to terminate the players' accounts without notice or showing of cause; (2) the TOS were unduly one-sided, giving Linden the right to unilaterally modify the terms without notice; (3) the clause forced the parties to share the cost of arbitration, which was estimated to be \$17,250; (4) the arbitration would take place in San Francisco, far from the plaintiff's residence in Pennsylvania; (5) the arbitration proceedings were to be confidential under the TOS; and (6) Linden could not justify the one-sidedness of the TOS.<sup>47</sup> Under the totality of these circumstances, the mandatory arbitration clause was found to be unconscionable, and therefore, unenforceable.

As no court has yet decided the issue, it is not clear whether a clause forcing a player to waive his or her publicity right could be deemed unconscionable and unenforceable. It is clear, however, that the hardship and damages caused by commercial use of a player's avatar are unlikely to approach the magnitude of the six

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<sup>42</sup> *Id.* at § 208 cmt. f.

<sup>43</sup> *Id.* at § 208 cmt. a.

<sup>44</sup> Under the common law, avoidance of a contract due to unconscionability requires a showing of "gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party". *Id.* at § 208 cmt. d (citations omitted).

<sup>45</sup> *Bragg*, 487 F. Supp. 2d at 597.

<sup>46</sup> *Id.*; An arbitration clause is "[a] contractual provision mandating arbitration—and thereby avoiding litigation—of disputes about the contracting parties' rights, duties, and liabilities." BLACK'S LAW DICTIONARY 120 (9th ed. 2009). In the current *Second Life* TOS, the arbitration provision is optional, not mandatory—a change that is likely the result of the *Bragg* case. *Second Life Terms of Service*, part 7.3, <http://secondlife.com/corporate/tos.php> (last visited April 8, 2010).

<sup>47</sup> *Bragg*, 487 F. Supp. 2d at 608-611.

circumstances cited by the *Bragg* court.<sup>48</sup> If it is assumed that that a waiver to the likeness of one's avatar is likely enforceable, and that "the focus of any right of publicity analysis must always be on the actor's own persona and not of the character's,"<sup>49</sup> any potential abuse of an avatar by game makers would not be analogous to commercial abuse of an individual's publicity right. However, these assumptions are undercut by psychological and social science studies surrounding online gaming.

## B. SHOULD PLAYERS HAVE PUBLICITY RIGHTS IN THEIR AVATARS, NOW OR IN THE FUTURE?

As gaming technology advances, a right to the likeness of a player's digital self becomes more viable. An estimated 30 to 45 million people participate in virtual worlds such as *Second Life*, *World of Warcraft*, and *Everquest*, with more joining each day.<sup>50</sup> The typical player will devote hundreds of hours and a substantial amount of money to develop his or her avatar.<sup>51</sup> Recent advances in graphics and sound technology have allowed creators to "render whole environments almost as richly detailed and animated as reality itself."<sup>52</sup> The primary reason, however, that more and more people are spending time inside these virtual worlds is simple – it's fun.<sup>53</sup> All fun aside, in analyzing MMORPGs, two facets of these worlds are

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<sup>48</sup> The damages associated with use of one's avatar would be purely monetary (*e.g.*, royalties), and, at worst, damage the player's in-game reputation. There is also an inconvenience associated with filing a lawsuit, but this inconvenience is associated with an assertion of any right.

<sup>49</sup> *Donchez v. Coors Brewing Co.*, 392 F.3d 1211, 1221 (10th Cir. 2004) (citing *Landham*, 227 F.3d 619).

<sup>50</sup> EDWARD CASTRONOVA, *EXODUS TO THE VIRTUAL WORLD: HOW ONLINE FUN IS CHANGING REALITY* 18 (2007).

<sup>51</sup> Florence Chee et al., *Online Gaming and the Interactional Self*, in *GAMING AS CULTURE: ESSAYS ON REALITY, IDENTITY AND EXPERIENCE IN FANTASY GAMES* 154, 164 (J. Patrick Williams et al. eds., 2006) (citing Edward Castronova, *Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier*, <http://www.bepress.com/cgi/viewcontent.cgi?article=1008&context=giwp>).

<sup>52</sup> Castronova, *supra* note 50, at 26.

<sup>53</sup> *Id.* at 15. As Castronova points out, not only are these worlds fun, they are designed to be more fun than the real world. *Id.* at 15-17.

important in considering the publicity right: (1) the relationship between the player and the player's virtual representation, and (2) the virtual communities these worlds foster.

### 1. CHARACTERS AND AVATARS AS MEDIATORS, AS SELVES

To interact with the virtual world, players create online representations. There are two ways a player can create these representations: (1) as an extension of the player's self, *i.e.*, as an avatar, or (2) as a character, *i.e.*, a representation separate from the player's real world identity.<sup>54</sup> While some games advertise the character creation process as creating an extension of the self,<sup>55</sup> fantasy games such as *World of Warcraft* merely allow players to create archetypal characters.

For players, both characters and avatars "are vehicles onto which they project their own goals, skills, experiences[,] and understanding of the game."<sup>56</sup> It is a vital part of the MMORPGs experience that player are able to interact with the virtual world "as an embodied representation of themselves."<sup>57</sup> In creating avatars and characters, psychology research shows that players attempt to create an accurate representation of themselves, or their ideal selves,<sup>58</sup> and that players

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<sup>54</sup> Ragnhild Tronstad, *Character Identification in World of Warcraft: The Relationship between Capacity and Appearance*, in *DIGITAL CULTURE, PLAY, AND IDENTITY: A WORLD OF WARCAFT READER* 248, 251 (Hilde G. Corneliussen and Jill W. Rettberg eds., 2008). The player considers the character a separate entity, different from the player, while the avatar is considered an extension of the self. *Id.*; see also *id.* at 258 ("In Indian mythology, the avatar is a god's representation on Earth; thus it seems reasonable to reserve the term for player-character relationships in which the character functions as a representative of the player in the game.").

<sup>55</sup> See Posting of Medievaldragon to <http://www.blizzplanet.com/blog/comments/verne-troyer---world-of-warcraft-tv-commercial> (Dec. 27, 2007, 1:06 PM) (Verne Troyer commercial for WoW); Posting of Medievaldragon to <http://www.blizzplanet.com/blog/comments/mr.-t-and-shatner---wow-commercials> (Nov. 20, 2007, 3:03 PM) (Mr. T and William Shatner commercials for WoW).

<sup>56</sup> Jan Simons, *Narrative, Games, and Theory*, Int'l J. of Computer Game Research (2007), available at <http://gamestudies.org/0701/articles/simons>.

<sup>57</sup> Katherine Bessiere et al., *The Ideal Elf: Identity Exploration in World of Warcraft*, 10 *CYBERPSYCHOLOGY & BEHAVIOR* 530, 530 (2007).

<sup>58</sup> *Id.* at 530-31 ("online environments offer people the option of creating multiple representations of themselves and exploring new aspects of themselves . . . the representations people make of themselves online are an amalgamation of their actual and ideal selves—that is, that the virtual self is a somewhat idealized actual self").

rely heavily on “real world personalities and experiences to construct” their online representations.<sup>59</sup> Additionally, avatars are often role-played

in ways that [are] closely related to [players’] real-world identities . . . this identification common in [MMORPG]s actually blurs the distinction between user and avatar: ‘Interaction with and immersion in the game affords users the narcissistic satisfaction of relating to a technological second self. [The avatar becomes] an extension of the play and the separateness of the avatar’s body is obliterated.’<sup>60</sup>

MMORPGs attempt to connect the player with the avatar to create a seamless experience where the difference between reality and virtuality is non-existent.<sup>61</sup> The law protects an individual’s likeness from commercial abuse not only because it has value, but because it is a part of an individual’s reasonable expectation of privacy that he or she should control his or her own identity and persona. The fact that MMORPGs foster such strong attachments between players and their avatars is a compelling reason to allow a player a similar semblance of control over his or her avatar that is afforded to his or her self through

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<sup>59</sup> Zachary C. Waggoner, *Passage to Morrowind: (Dis)locating Virtual and “Real” Identities in Video Role-Playing Games* 155 (May 2007) (unpublished Ph.D dissertation, Arizona State University) (available via ProQuest); Asimina Vasalou et al., *Avatars in social media: Balancing accuracy, playfulness and embodied messages*, 66 INT’L J. OF HUMAN-COMPUTER STUDIES 801, 808 (2008) (“avatars’ physical characteristics were chosen carefully to reflect their owners’ appearance.”).

<sup>60</sup> Waggoner, *supra* note 59, at 161. It is this ability to play as the self that separates MMORPGs from other character-driven media. Melissa L. Lewis et al., *“They May Be Pixels, But They’re MY Pixels:” Developing a Metric of Character Attachment in Role-Playing Video Games*, 11 CYBERPSYCHOLOGY & BEHAVIOR 515, 515 (2008). Character attachment manifests in five different ways “as an individual’s feelings of (a) friendship and (b) identification with a video game character when an individual (c) is willing to suspend disbelief, (d) feels responsible for the game character, and (e) feels in control of the game character’s actions.” *Id.* at 516.

<sup>61</sup> Ideally, “[t]he player and the character are [] perfectly connected, which requires that the player has internalized the controls and game mechanics to such a degree that the medium between himself and the gameworld becomes transparent.” Tronstad, *supra* note 54, at 254. In this state, the player will lose self-consciousness and self-reflection. *Id.* In this state, the avatar appears to the character as a “moment of ephemeral, sensuous presence.” *Id.* Of course, MMORPGs do not always play in this state; many activities are tedious (such as leveling and gathering materials). *Id.* at 255.

the publicity right. At the very least, it is a compelling reason to find that a waiver of the publicity right over one's avatar in a contract of adhesion is substantively unconscionable.

Publicity rights have been extended to numerous media—from film to photo to audio. In theory, one should be able to protect one's likeness regardless of the medium. In many games, however, players create characters that do not look remotely like themselves.<sup>62</sup> Even in MMORPGs where players can create avatars in their own image, such as *Second Life*, they often fail to create a likeness of themselves.<sup>63</sup> Animation technology has a long way to go before avatars truly begin to resemble their players. Until this happens, extension of the publicity right to avatars could only be justified on psychological grounds—*i.e.*, that players consider these representations to be a part of themselves. While there is a certain appeal to this reasoning, it seems to be an unlikely ground upon which courts or legislatures will advance privacy jurisprudence.

## 2. THE MMORPG VIRTUAL COMMUNITY

Notions of community are concepts that exist only in the mind; theorists have posited that all communities are virtual to a certain extent.<sup>64</sup> MMORPGs offer communities and interactions similar to the real world: they provide work for players, allow groups to form and interact, and often sustain a dynamic in-game economy.<sup>65</sup> MMORPGs offer players the opportunity to work, communicate, interact, and change the virtual worlds around them; avatars act as “extensions” of the self, allowing a person to pursue “prestige, acquisitions, social standing, friendship, camaraderie, connection[,]

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<sup>62</sup> *World of Warcraft* is one such game. There are a limited number of characters a person could play, with a limited range of physical appearances.

<sup>63</sup> Current graphics technology is incapable of creating an exact, photo-realistic likeness of a person. The harder animators seem to try, the worse the likeness seems to become. The problem is one of the “uncanny valley” – as avatars look more human, their non-human qualities begin to stand out, and the avatar quickly loses appeal. Daniel Floyd, *Video Games and the Uncanny Valley*, <http://www.youtube.com/watch?v=FKTAJBQSm10> (last visited April 8, 2010). There are many games that attempt to approach realistic looking avatars, *e.g.*, *Tiger Woods PGA Tour 2009 All-Play* for the Nintendo Wii, that simply end up looking creepy and off-putting.

<sup>64</sup> Chee et al., *supra* note 51 at 160.

<sup>65</sup> *Id.* at 161.

and community” online.<sup>66</sup> These motivations are acts of community and can lead to addict-like behavior, behavior that is fed by the sense of community and commitment that long-hours of game play foster.<sup>67</sup> As one study suggests, playing such games “holds deeply meaningful and shared experiences that are rooted in community values and reciprocal projects.”<sup>68</sup>

Thus, MMORPGs not only offer players a sense of self, but provide them with a sense of community as well. This communal concept is important in that it reminds us that virtual worlds offer structure and content that is similar or superior to that of the real world. The difference between the virtual and real worlds is that the virtual worlds are owned and operated entirely by for-profit corporations. With an increasingly larger proportion of people spending long hours inside virtual worlds, the game design decisions made by Linden Labs and Blizzard are equivalent to public policy decisions. “This is because, structurally, [game design and public policy design] are the same. They both involve assessing the interests of large numbers of otherwise unassociated people, and then determining the best course of action for the authorities.”<sup>69</sup> While public policy seeks to maximize prosperity and a host of other legitimate concerns, game design seeks to maximize fun, and thereby profit.<sup>70</sup> Policy makers, however, are accountable for their abuses; the most a player can do to an abusive game designer is to have fun elsewhere.

#### IV. POTENTIAL INVASIONS OF PRIVACY RELATED TO AVATARS: VIOLATIONS OF THE PUBLICITY RIGHT & THE DANGERS OF BEHAVIORAL ADVERTISING

Commercial abuse of a person’s likeness can take many forms, including use in advertising. However, one difference between regular advertising and advertising on the internet is the potential for interactivity; whereas traditional advertising is a one-way medium, the internet allows for two-way communication such that the

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<sup>66</sup> *Id.* at 165.

<sup>67</sup> *Id.* at 168.

<sup>68</sup> *Id.*

<sup>69</sup> Castronova, *supra* note 50, at xvii. *See generally id.* at 109-133.

<sup>70</sup> *Id.* at 111.

consumer is engaged in the message.<sup>71</sup> Internet advertising also has the capacity to be highly personalized— in fact, the ability of a user to customize his or her internet experience affords advertisers an unprecedented ability to develop a consumer profile of that user.<sup>72</sup> Social networking website users are familiar with the potential of internet advertising. Many users of *Facebook* have protested that site's movements towards intrusive advertising models such as advertisements that use a person's profile pictures in order to advertise products and services to that person's friends.<sup>73</sup>

MMORPGs present a similar potential for abuse to that of social networking. For example, *Second Life* has a vibrant in-game economy that is driven by players creating digital goods for consumption. This type of market mimics the real world market in that vendors are incentivized to have their products associated with certain people. Thus, in *Second Life*, it is possible for players to advertise their own products and use the likeness of another player's avatar in doing so. Similarly, the game makers may use an avatar to advertise the game itself. This use of the avatars seems rather innocuous on the surface; however, given the enormous amount of wealth that these games generate, these are precisely the kind of uses that the publicity right was meant to protect against. However, as noted above, the publicity right would likely only extend to avatars if technology allowed for a photorealistic representation of the player.<sup>74</sup>

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<sup>71</sup> Sally J. McMillan, *Internet Advertising: One Face or Many?*, in *INTERNET ADVERTISING: THEORY AND RESEARCH* 2ND ED. 15, 17 (David W. Schumann & Esther Thorson eds., 2<sup>nd</sup> ed., 2007).

<sup>72</sup> *Id.* at 18.

<sup>73</sup> Megan McCarthy, *Facebook Ads Make You the Star — And You May Not Know It*, WIRED, Jan. 2, 2008, <http://www.wired.com/epicenter/2008/01/facebook-ads-ma>; Meghan Keane, *Facebook's New Social Ads Turn Your Friends Into Marketers*, WIRED, Aug. 20, 2008, <http://www.wired.com/epicenter/2008/08/your-facebook-n>; Lee Mathews, *Facebook sez, "Don't mind us, we're just whoring out your photos"*, DOWNLOADSSQUAD.COM, Jul. 16, 2009, <http://www.downloadsquad.com/2009/07/16/facebook-sez-dont-mind-us-were-just-whoring-out-your-photos>.

<sup>74</sup> Applying the publicity rights to avatars is similar to applying publicity rights to the digital representation of an actor. Erin Giacoppo, Note, *Avoiding the Tragedy of Frankenstein: The Application of the Right of Publicity to the Use of Digitally Reproduced Actors in Film*, 48 HASTINGS L.J. 601, 607-10, 618-20 (1997). The difference is, of course, that a wizard that looks like its player is not worth nearly as much as, say, Tom Hanks' likeness in *The Polar Express*. See *THE POLAR EXPRESS* (Castle Rock Entertainment 2004).



The potential intrusiveness exposes players and users not only to misappropriation of their likenesses, but also, unsettlingly, allows information to be gathered regarding all of a person's virtual movements. It is unsettling because "the borders between cyberspace and real space are not clearly defined. They are porous, flexible, fluid, and shifting."<sup>75</sup> Our personhood in cyberspace is more easily connected with private information that might otherwise remain disparate and scattered.<sup>76</sup> As advertising shifts online and becomes more targeted, it is likely that avatars could become not only mediums of advertising,<sup>77</sup> but also a means of gathering consumer profiles. This is especially true given the large amounts of time people are spending in avatar form<sup>78</sup> and the rate at which technology is advancing.<sup>79</sup>

Given the fun virtual worlds offer, it is possible to envision virtual worlds set up not as games but as universities, offices, or shopping malls. It flies in the face of notions of privacy that participation in the virtual world is contingent on information being gathered about a user, and that users will have no control over how their virtual likeness may be used.<sup>80</sup> One of the primary benefits of the virtual

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<sup>75</sup> Penney, *supra* note 3, at 198.

<sup>76</sup> *Id.* ("Where we have physical bodies separate from the information recorded about us, personhood in cyberspace is more intimately connected to this information. If privacy sets out to protect the interests of the virtual person in cyberspace, then privacy in this data and information becomes essential ... our 'virtual person' is an important extension of our own person and identity, with implications for intimacy and dignity.").

<sup>77</sup> See, e.g., Josh Quittner, *RIP Facebook?*, CNNMONEY.COM, Dec. 4, 2007, <http://techland.blogs.fortune.cnn.com/2007/12/04/rip-facebook> ("Beacon social ads scheme that tracks people's web-surfing habits even when they're not on the site").

<sup>78</sup> "The average intensity of playing MMORPGs is 22.7 hours per week, with about 9% of players spending more than 40 hours a week. Over 60% of players also confirmed that they sometimes spend over 10 hours at a time." David Smahel et al., *Playing MMORPGs: Connections between Addiction and Identifying with a Character*, 11 CYBERPSYCHOLOGY & BEHAVIOR 715, 715 (2008).

<sup>79</sup> "[I]t is quite conceivable that in a few years avatars whose behavior is nearly imperceptible from humans' will be available." Judith Donath, *Virtually Trustworthy*, 317 SCIENCE 53 (2007).

<sup>80</sup> As was stated in the seminal article on the right to privacy, "The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. Under our system of government, he can never be compelled to express them (except when upon the witness stand); and even if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them. The existence of this right does not

world is that it is accessible from almost anywhere. Such worlds also allow us to be connected to people and places in ways that would otherwise be impossible. These benefits also allow for behavioral advertising practices – *i.e.*, using a person's online habits to determine his or her interests.<sup>81</sup> While most internet companies are allowed to collect this information, this practice is beginning to be regulated and litigated in the U.S. and E.U.<sup>82</sup> The average web surfer has a reasonable expectation of privacy that he or she will not be tracked while surfing,<sup>83</sup> and this expectation is no different for online gamers. Indeed, MMORPGs give even greater insight into an individual's mind than regular surfing;<sup>84</sup> players use their avatars to shop, socialize, fight, love, imagine, and travel. Such exposure warrants a greater degree of protection for players and their avatars.

Given the potential for harm here, additional legal protection is warranted for a person's avatar. In the United States, a great deal of private information is protected using an opt-in or opt-out system. "An opt-in provision, [sic] means the web site will not use the information unless the consumer specifically says it is permissible to do so. An opt-out provision means the web site can use the information collected unless the consumer specifically directs the site no [sic] to do so."<sup>85</sup> For example, the CAN-SPAM Act of 2003 regulates how commercial entities in the United States can send spam email by giving the recipients the right to opt-out of future emails.<sup>86</sup>

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depend upon the particular method of expression adopted." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890).

<sup>81</sup> Matthew Bender et al., 1-2A Computer Law § 2A.20 (2009); James Schedwin, *Online and Locational Privacy*, 4 ISJLP 709, 710 (2009).

<sup>82</sup> Bender, *supra* note 81; *see also* Melkonian v. Facebook, Inc., No. 30-2009, complaint filed Aug. 17, 2009 (Cal.) (alleging, *inter alia*, misappropriation of name and likeness).

<sup>83</sup> Andrew Hotaling, *Protecting Personally Identifiable Information on the Internet: Notice and Consent in the Age of Behavioral Targeting*, 16 COMMLAW CONSPECTUS 529, 549 (2008). *See also* Heather O. Ng, *Targeting Bad Behavior: Why Federal Regulators Must Treat Online Behavioral Marketing as Spyware*, 31 HASTINGS COMM. & ENT. L.J. 369, 375-82 (2009) (explaining the harms of behavioral advertising).

<sup>84</sup> *See* Ng, *supra* note 83, at 378.

<sup>85</sup> R. Ken Pippin, *Consumer Privacy on the Internet: It's "Surfer Beware"*, 47 A.F.L. REV. 125, 132 (1999).

<sup>86</sup> The CAN-SPAM Act: A Compliance Guide for Business, <http://www.ftc.gov/bcp/edu/pubs/business/ecommerce/bus61.shtm> (last visited April 8, 2010).

Similarly, the Gramm-Leach-Bliley Act regulates the financial industry and requires that such companies give consumers the ability to opt-out of having private information shared with third parties.<sup>87</sup> Applying this principle to MMORPGs would, at the very least, serve two functions: first, it would put players on notice of any information that is being collected; and, second, it would allow players to weigh the privacy costs of playing an MMORPG against the game's benefit in order to make an informed choice. While, opt-out/opt-in laws are the most lenient and industry-friendly form of privacy protection, they are also provide consumers with a minimal level of protection.

## V. COPYRIGHT PREEMPTION OF THE PUBLICITY RIGHT

The following sections give an overview of copyright law, federal preemption of state law, and the copyright preemption statute. Finally, this section seeks to discover how copyright law might preempt the publicity right.

### A. COPYRIGHT AND PREEMPTION

Intellectual property rights are a reward for an act of creation, unlike traditional property rights, which are associated with unique lands or items. Intellectual property owners are given a monopoly over the market for their creations.<sup>88</sup> The Copyright Clause of the United States Constitution gives Congress the mandate "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."<sup>89</sup> Copyright is more than a literal right to copy, as

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<sup>87</sup> 15 U.S.C. § 6802(b).

<sup>88</sup> "[Intellectual property] protection is thus meant to encourage persons to become more productive by allowing them to capture some of the benefits of their useful behaviour [sic]. It involves however a trade-off between the granted author's limited monopoly and the need of the society as a whole to make use of the author's creativity and innovation." Mira B. Nenova, *New Technologies and the Protection and Promotion of Traditional Cultural Expressions*, at 4 (May 2007); [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1090824](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090824). Thus, what intellectual property law seeks to reward is not the creation of property, but rather the creative act.

<sup>89</sup> U.S. CONST. art. I, § 7. "The legislative history of the Copyright Act describes several other objectives: 1) to promote national uniformity and avoid the difficulties of determining and enforcing rights under different state laws; 2) to have copyright protection last for a limited time period, so that scholars and the public can benefit from the dissemination of copyrighted materials; and 3) to improve our international dealings in

the name might imply. A work is afforded copyright when it is (1) sufficiently original and (2) fixed in a tangible form.<sup>90</sup> A copyright gives an author the right to do (and in turn prevent others from doing) six things: to reproduce the work; to prepare derivative works;<sup>91</sup> to distribute the work; to perform the work; to display the work; and to perform the work by means of digital audio transmission.<sup>92</sup> These six rights are the exclusive rights within the general scope of copyright that will be discussed below.

In certain cases, the federal government can take over an area of law and prevent the states from legislating in that area. This is the concept of preemption.<sup>93</sup> In the case of federal copyright law, preemption is expressly set out in the copyright statute. The copyright preemption statute prevents competing state systems of copyright

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copyrighted materials.” *Brown v. Ames*, 201 F.3d 654, 660 (5th Cir. 2000) (citing *H. R. Rep. No. 94-1476*, at 129-30 (1976)).

<sup>90</sup> 17 U.S.C. § 102(a) (LexisNexis 2009) holds that “Copyright protection subsists, in accordance with this title, in *original* works of authorship *fixed in any tangible medium of expression*, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” (emphasis added).

<sup>91</sup> A “derivative work” is defined as “a work based upon one or more preexisting works.” 17 U.S.C. § 101 (West 2009).

<sup>92</sup> 17 U.S.C. §106(1) through (6) (West 2009).

<sup>93</sup> The Supremacy Clause of the United States Constitution permits federal law to preempt or supersede conflicting state law, providing that “This Constitution, and the Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, cl. 2 [sic]. Thus, “state laws that conflict with federal law are without effect.” *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008) (citations and internal quotation marks removed). However, “there is a presumption against the supplanting of historic state police powers by the federal government unless preemption is the clear and manifest purpose of Congress.” *Tyrrell v. Norfolk S. Ry. Co.*, 248 F.3d 517, 522 (6th Cir. 2001) (citations and internal quotations marks omitted).

Given this presumption, federal law will preempt state law only “where (1) a federal statute expressly preempts state law, (2) a federal law impliedly preempts state law, or (3) federal law and state law actually conflict.” *Gibson v. Am. Bankers Ins. Co.*, 289 F.3d 943, 948-49 (6th Cir. 2002). Under the latter standard, the courts will not construe state and federal law to be in conflict unless compliance with both is physically impossible, or if the state law is an obstacle to realizing the full purposes and objectives of Congress. *Id.* at 949 (citations and internal quotation marks omitted).

law;<sup>94</sup> the statute preempts state laws that purport to give rights that are *equivalent* to the aforementioned six exclusive rights of copyright, and that come within the *subject matter* of copyright.<sup>95</sup> There are eight types of work that come within the subject matter of copyright: “(1) literary works; (2) musical works . . . ; (3) dramatic works . . . ; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.”<sup>96</sup> Copyright only protects works in these subjects where they are sufficiently original<sup>97</sup> and fixed in a tangible medium of expression.<sup>98</sup> A state law cannot award rights in these eight subject matters to works that are fixed and original without running afoul of federal copyright law.

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<sup>94</sup> Under the prior statutory scheme, state systems of copyright law might have been possible. This possibility was acknowledged by the Supreme Court in *Goldstein v. California*, 412 U.S. 546, 553 (1973). However, the current copyright scheme disallows any state copyrights acts from regulating concurrent with the Copyright Act of 1976. Melville B. Nimmer, 1-1 Nimmer on Copyright § 1.01[A] (rev. ed. 2009).

<sup>95</sup> 17 U.S.C. § 301(a) (Lexis Nexis 2006). A state law will not be considered equivalent if the state law carries elements in addition to copyright elements. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 200 (2d. Cir. 1983) (“[W]hen a state law violation is predicated upon an act incorporating elements beyond mere reproduction or the like, the rights involved are not equivalent and preemption will not occur.”); *Toney v. L’Oreal USA, Inc.*, 406 F.3d 905, 910 (7th Cir. 2005) (“to avoid preemption, a state law must regulate conduct that is qualitatively distinguishable from that governed by federal copyright law—i.e., conduct other than reproduction, adaptation, publication, performance, and display.”).

<sup>96</sup> 17 U.S.C. § 102(a) (LexisNexis 2009) (punctuation changed). In addition, compilations and derivative works are within the subject matter of copyright. 17 U.S.C. § 103 (LexisNexis 2009).

<sup>97</sup> 17 U.S.C. § 102(a) (LexisNexis 2009); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363 (1991) (“As a constitutional matter, copyright protects only those constituent elements of a work that possess more than a de minimis quantum of creativity.”).

<sup>98</sup> 17 U.S.C. § 102(a) (LexisNexis 2009); “A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” 17 U.S.C. § 101 (definitions); *Midway Mfg. Co. v. Artic International, Inc.*, 704 F.2d 1009, 1012 (7th Cir. 1983) (finding video games to be fixed).

## B. COPYRIGHT PREEMPTION OF THE PUBLICITY RIGHT

Many courts consider it a given that the right of publicity is not preempted by copyright law.<sup>99</sup> However, in certain circumstances, copyright law can preempt the right of publicity. This occurs when an individual's publicity rights claim is "intimately interlocked with a claim for reproduction of a copyrightable work."<sup>100</sup> Whether the publicity right is preempted is entirely based on how a court chooses to conceptualize the right. The test mentioned above requires preemption of rights that are equivalent, covering the same subject matter of copyright. In large part, the courts will preempt the publicity right when the facts presented indicate that the plaintiff is not attempting to protect his or her likeness, but rather attempting to prevent the exercise of an otherwise valid copyright. For example, in *Stanford v. Caesars Entertainment, Inc.*, an actor who portrayed a character named Loose Slot Louie in a casino advertising campaign sued the casinos, arguing that the advertisements violated his publicity rights.<sup>101</sup> The court disagreed. The basis of the court's decision was that Stanford was attempting to interfere with an otherwise-valid exercise of copyright.<sup>102</sup>

The arguments for and against preemption will be discussed for equivalency and then subject matter. The section concludes with a discussion of fixation and the relevant legislative history of the Copyright Act of 1976.

### 1. IS THE PUBLICITY RIGHT EQUIVALENT TO COPYRIGHT?

The argument that the publicity right is not equivalent to copyright (and therefore is not preempted by it) is as follows. The sole purpose of the publicity right is to "allow a person to control the

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<sup>99</sup> *Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867, 867 (C.D. Cal. 1999) ("Plaintiff's own likeness and name cannot seriously be argued to constitute a 'work of authorship' within the meaning of 17 U.S.C. § 102. Thus, copyright preemption does not apply.").

<sup>100</sup> 2 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 11:49 (2d ed. 2000).

<sup>101</sup> *Stanford v. Caesars Entertainment, Inc.*, 430 F. Supp. 2d 749, 751 (2006).

<sup>102</sup> *See id.* at 756-57 ("The fact that Plaintiff is disputing Defendants' use of his image, not as Crisper Stanford, but as Crisper Stanford playing "Loose Slot Louie," makes his case unlike those in which courts have found that federal copyright law does not preempt a state-law right of publicity.").

commercial value of his or her identity.”<sup>103</sup> Therefore, a violation of the publicity right requires a showing of a commercial purpose, which a copyright infringement does not require.<sup>104</sup> This indicates that the rights are in fact separate, and that consenting to one is not the same as consenting to both.<sup>105</sup> The argument continues, “[i]dentity ... is an amorphous concept that is not protected by copyright law; thus, the state law protecting it is not preempted.”<sup>106</sup> Copyright arises only out of an act of authorship. Likeness is not the product of original authorship, and therefore likeness is not equivalent to copyright.<sup>107</sup> For example, in *Toney v. L’Oreal USA, Inc.*,<sup>108</sup> the Seventh Circuit found that copyright did not preempt a model’s claim for violation of her publicity right when the basis for the model’s claim was that the company using her likeness was using it to send an unauthorized message—i.e., that the model endorsed certain products.<sup>109</sup>

Alternatively, copyright and the publicity right can be construed as equivalent. A person should not be able use the state law publicity right to prevent the exercise of an otherwise valid copyright.<sup>110</sup> Nor should the publicity right be used as an end-run around an otherwise

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<sup>103</sup> *Toney v. L’Oreal USA, Inc.*, 406 F.3d 905, 910 (7th Cir. 2005).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* (“The fact that Toney consented to the use of her photograph originally does not change this analysis. The defendants did not have her consent to continue to use the photograph, and therefore, they stripped Toney of her right to control the commercial value of her identity.”)

<sup>106</sup> *Id.*; see also *Apigram Publ’g Co. v. Factors Etc., Inc.*, No. C 78-525, 1980 WL 2047, at 4-5 (N.D. Ohio July 30, 1980) (finding that “the common law right of publicity is not equivalent to the rights protected by federal copyright law. A cause of action based on the right of publicity involves elements, such as the invasion of personal privacy rights, which are not present in the law of copyright.”).

<sup>107</sup> *KNB Enters. v. Matthews*, 78 Cal. App. 4th 362, 374 (Cal. Dist. Ct. App. 2d 2000) (quoting Melville B. Nimmer, 1 *Nimmer on Copyright* § 1.01[B][1][c] (rev. ed. 1996)).

<sup>108</sup> *Toney*, 406 F.3d 905.

<sup>109</sup> *Id.* at 910.

<sup>110</sup> *Fleet v. CBS, Inc.*, 50 Cal. App. 4th 1911, 1923 (Cal. App. 2d Dist. 1996) (“A party who does not hold the copyright in a performance captured on film cannot prevent the one who does from exploiting it by resort to state law.”) (“The players could not prevent the clubs from exploiting the works by asserting a state law claim for violation of the right of publicity.”).

valid contract or waiver of copyright.<sup>111</sup> Often, when an individual seeks to enforce his or her publicity right, the basis for the claim is to prevent copying, distribution, and performance of a work “contained within a copyrighted medium,”<sup>112</sup> and not for a claim for imitation<sup>113</sup> or unwilling promotion.<sup>114</sup> For example, in a recent case, *The Romantics, Inc. v. Activision Publishing, Inc.*, a musical group alleged violation of their publicity right for the use of one of their songs in the video game *Guitar Hero*.<sup>115</sup> Using a valid license from the song’s copyright holder, the defendants had synchronized the Romantics song to video game graphics so that players could play a guitar in the band.<sup>116</sup> The court held that the plaintiffs’ right of publicity claim arose from an arrangement of a musical work that allegedly sounded similar to the “sound recording released by The Romantics in 1980, as distinct from the sound of any individual’s voice or musical performance existing separate and apart from a copyrighted work.”<sup>117</sup> In other words, the plaintiffs’ publicity rights claim was an attempt to control the sale, distribution, and copying of a copyrighted sound recording; it was not an attempt to stop an imitator or prevent unwilling promotion using their likenesses.<sup>118</sup> In situations such as the *Romantics* case, where

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<sup>111</sup> *Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663, 679 (7th Cir. 1986) (“In this litigation, the Players have attempted to obtain ex post what they did not negotiate ex ante. That is to say, they seek a judicial declaration that they possess a right—the right to control the telecasts of major league baseball games—that they could not procure in bargaining with the Clubs. The Players’ aim is to share in the increasingly lucrative revenues derived from the sale of television rights for over-the-air broadcasts by local stations and national networks and for distribution by subscription and pay cable services. Contrary to the Players’ contention, the effect of this decision is not to grant the Clubs perpetual rights to the Players’ performances. The Players remain free to attain their objective by bargaining with the Clubs for a contractual declaration that the Players own a joint or an exclusive interest in the copyright of the telecasts.”).

<sup>112</sup> *Laws v. Sony Music Entm’t, Inc.*, 448 F.3d 1134, 1141 (9th Cir. 2006).

<sup>113</sup> *E.g.*, *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

<sup>114</sup> *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1003 (9th Cir. 2001).

<sup>115</sup> *The Romantics, Inc. v. Activision Publ’g, Inc.*, 532 F. Supp. 2d 884, 889 (E.D. Mich. 2008); *Guitar Hero* - Wikipedia, the free encyclopedia, [http://en.wikipedia.org/wiki/Guitar\\_Hero\\_\(series\)](http://en.wikipedia.org/wiki/Guitar_Hero_(series)) (last visited April 8, 2010).

<sup>116</sup> *Romantics*, 532 F. Supp. 2d at 887.

<sup>117</sup> *Id.* at 889.

<sup>118</sup> *Id.*; *See also Laws v. Sony Music Entm’t, Inc.*, 448 F.3d 1134, 1141 (9th Cir. 2006) (“It is clear that federal copyright law preempts a claim alleging misappropriation of one’s voice



plaintiffs are not complaining about misuse of their likeness, but rather the use of their likenesses in a valid exercise of copyright, courts will preempt those publicity claims. The additional element of 'commercial use' in such cases is not transformative enough to distinguish a right of publicity claim from a copyright claim.<sup>119</sup> Without this transformative element, certain state law publicity right claims are preempted by federal copyright law.

## 2. IS THE PUBLICITY RIGHT WITHIN THE SUBJECT MATTER OF COPYRIGHT?

The argument that the publicity right is outside the subject matter of copyright<sup>120</sup> (and therefore not preempted) is as follows. Violation of the right of publicity "may sometimes occur by acts of reproduction, distribution, performance, or display, but inasmuch as the *essence* of the tort does not lie in such acts, pre-emption should not apply."<sup>121</sup> The essence of the tort is the protection of a person's likeness from commercial misappropriation, and "[a] person's name or likeness is not a work of authorship ... [even if] embodied in a copyrightable [work]."<sup>122</sup> A persona or likeness, even if so embodied, cannot be copyrighted under current law; therefore, there is no overlap between the publicity right and the subject matter of copyright that warrants

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when the entirety of the allegedly misappropriated vocal performance is contained within a copyrighted medium."); *KNB Enters. v. Matthews*, 78 Cal. App. 4th 362, 373 (Cal. Dist. Ct. App. 2d 2000) (quoting Melville B. Nimmer, 1 NIMMER ON COPYRIGHT § 1.01[B][1] (rev. ed. 1996)) ("A right is equivalent to rights within the exclusive province of copyright when it is infringed by the mere act of reproducing, performing, distributing, or displaying the work at issue. A claim asserted to prevent nothing more than the reproduction, performance, distribution, or display of a dramatic performance captured on film is subsumed by copyright law and preempted.").

<sup>119</sup> *Laws*, 448 F.3d at 1144-45.

<sup>120</sup> As noted above, there are eight types of work that come within the *subject matter* of copyright: "literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works." 17 U.S.C. § 102(a) (LexisNexis 2009) (punctuation changed). In addition, compilations and derivative works are within the subject matter of copyright. 17 U.S.C. § 103 (LexisNexis 2009).

<sup>121</sup> *KNB*, 78 Cal. App. 4th at 374 (emphasis added).

<sup>122</sup> *Downing*, 265 F.3d at 1004-1005.

preemption.<sup>123</sup> Only if the publicity right is used to extend copyright-like protection to works in the public domain or punish works that exercise fair use, should preemption be guaranteed.<sup>124</sup> Otherwise, the elements of the right to likeness are so “different in kind” from copyright claims that preemption is rarely appropriate.<sup>125</sup>

What courts often fail to see is that the subject matter of the publicity right is not a specific work of art; rather the publicity right protects identity or persona. “To argue that the photograph is identical with the person is to confuse illusion and illustration with reality.”<sup>126</sup> For example, in *Downing v. Abercrombie & Fitch*,<sup>127</sup> a group of surfers claimed a violation of their publicity rights through unauthorized use of a photograph.<sup>128</sup> The Ninth Circuit found that, while the photograph was within the subject of copyright, a person’s name or likeness is not a work of authorship as it is conceived in the Copyright Act.<sup>129</sup>

It is possible that copyright and the publicity right may share a subject matter. When there are no promotional or imitation issues in a case, the publicity rights “action challenges control of the artistic work itself and could hardly be more closely related to the subject matter of the Copyright Act.”<sup>130</sup> When such objections are raised, they are not objections to the misuse of likeness, but rather objections to the fact that such parties do not own a copyright in their works of

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<sup>123</sup> *KNB*, 78 Cal. App. 4th at 374-75 (“[T]he subjects of the claims are the models’ likenesses, which are not copyrightable even though ‘embodied in a copyrightable work such as a photograph.’”) (citations omitted); *Facenda v. NFL Films, Inc.*, 542 F.3d 1007, 1027 (3d Cir. 2008) (“voice is outside the subject matter of copyright”).

<sup>124</sup> *Toney*, 406 F.3d at 911 (“State laws that intrude on the domain of copyright are preempted even if the particular expression is neither copyrighted nor copyrightable. Such a result is essential in order to preserve the extent of the public domain established by copyright law.”).

<sup>125</sup> *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1100 (9th Cir. 1991) (citations omitted).

<sup>126</sup> *Downing*, 265 F.3d at 1003 (quoting J. Thomas McCarthy, 2 *Rights of Publicity & Privacy* § 11.13[C] (1st ed., 1997)).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 999.

<sup>129</sup> *Id.* at 1004-1005.

<sup>130</sup> *Laws*, 448 F.3d at 1142.

authorship.<sup>131</sup> Even if the claims arise out of imitation (especially in the case of music), copyright law allows for the licensing of such imitation<sup>132</sup> and state law cannot act as a bar to these licenses.

### 3. FIXATION AND THE PREEMPTION OF THE PUBLICITY RIGHT

Courts that find preemption of the publicity right only do so where the likeness has been fixed in a tangible medium of expression.<sup>133</sup> A work is “fixed” when it is permanently embodied in a perceptible form.<sup>134</sup> Fixation can take the form of photographs, sound recordings, movies, video games, etc. The fact that a persona is fixed within another work means that a violation of a person’s publicity right can occur by the “mere act of reproducing, performing, distributing, or displaying the work at issue.”<sup>135</sup> Therefore, a work must be fixed before any publicity rights arising out of the work are preempted by copyright.<sup>136</sup> However, some courts do not consider fixation to be

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<sup>131</sup> *Id.* at 1144; *Villa v. Brady Publ’g*, No. 02 C 570, 2002 WL 1400345, at 10 (N.D. Ill. 2002) (“The fact that the mural incorporates the pseudonym is incidental; the essence of the behavior with which Villa truly takes issue is the reproduction, distribution, and display of his artwork without his permission. There is nothing in the allegations of Count III that would not also implicate the rights contained in 17 U.S.C. § 106.”); *Romantics*, 532 F. Supp. 2d at 889 (“Identity claims to the sound of the Song are essentially claims regarding the licensing of a copyrighted work, falling squarely within the ‘subject matter’ of the Copyright Act.”).

<sup>132</sup> “[S]ections 106 and 114(b) of the Copyright Act permit the owner of a copyright in a musical composition to license others to make specified commercial uses of the composition. This expressly allows third parties such as Defendants to make a sound-alike recording of a song. Further, the Copyright Act, 17 U.S.C. § 114(b), expressly disallows any recourse for such sound-alike recordings of a song.” *Romantics*, 532 F. Supp. 2d at 889.

<sup>133</sup> “For a persona to fall under the scope of copyright as defined by § 102, it must be ‘fixed’ in a tangible medium of expression. To be ‘fixed’ in a tangible medium of expression a work must be embodied in a copy ‘by or under the authority of the author.’” *Leto v. RCA Corp.*, 341 F. Supp. 2d 1001, 1006 (N.D. Ill. 2004) (citations omitted); *Fleet v. CBS, Inc.*, 50 Cal. App. 4th 1911, 1923 (Cal. App. 2d Dist. 1996) (“By virtue of being videotaped . . . the players’ performances are fixed in tangible form, and any rights of publicity in their performances that are equivalent to the rights contained in the copyright of the telecast are preempted.”).

<sup>134</sup> 17 U.S.C. § 101 (LexisNexis 2009).

<sup>135</sup> *Fleet v. CBS, Inc.*, 50 Cal. App. 4th at 1924.

<sup>136</sup> *Baltimore Orioles, Inc.*, 805 F.2d at 675 n. 22 (“To be ‘fixed’ in tangible form, a work must be recorded ‘by or under the authority of the author,’ here Zacchini. Because Zacchini did not consent to the telecast, the broadcast could not be ‘fixed’ for the purpose

relevant to the preemption analysis; rather, because the basis of the publicity right is in “personal rights of privacy” and not artistic control, it cannot fall within the ambit of copyright preemption.<sup>137</sup>

#### 4. PREEMPTION OF PUBLICITY RIGHT IN THE LEGISLATIVE HISTORY OF THE COPYRIGHT ACT OF 1976

The legislative history of the Copyright Act of 1976<sup>138</sup> leans toward a very narrow preemption of state law rights. To begin, the Supreme Court noted in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.* that “[t]he case for federal pre-emption is particularly weak where Congress (1) has indicated its awareness of the operation of state law in a field of federal interest, and (2) has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.”<sup>139</sup> Congress appears to have had just such an awareness of the publicity right. As courts have noted, the legislative history of section 301(a) of the Copyright Act—the preemption statute—indicates that Congress wished for the publicity right to remain unaffected by the preemption provision “as long as the causes of action contain elements, such as an invasion of personal rights” different from the elements of copyright infringement.<sup>140</sup>

However, other courts maintain that Congress contemplated that “as long as a work fits within one of the general subject matter” of copyright, it preempts state law. Such courts argue that section 301(a)

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of copyrightability and Zacchini's right of publicity would not be subject to preemption.”) (citing facts of *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977)).

It is noteworthy that fixation requires consent or authority, *Leto v. RCA Corp.*, 341 F. Supp. 2d 1001, 1006 (N.D. Ill. 2004) (“Defendants have not evidenced that the photographs were taken ‘by or under the authority’ of the plaintiffs and, therefore, we cannot find that the works which plaintiffs seek to protect—their *personas*—are ‘fixed’ and copyrightable.”) (citing 17 U.S.C. § 101), and that consent is a defense to the violation of the publicity right.

<sup>137</sup> *Norred v. Labren Enters. and Mgmt.*, No. 04-2690, 2005 U.S. Dist. LEXIS 36566, at \*6 (E.D. La. Nov. 14, 2005).

<sup>138</sup> Copyright Act of 1976, Pub. L. 94-553, 90 Stat. 2541 (1976).

<sup>139</sup> *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989) (citations and internal quotation marks omitted).

<sup>140</sup> *Waits v. Frito-Lay, Inc.*, 978 F.2d at 1100 (quoting H. R. Rep. No. 94-1476, at 132 (1976), available at [http://en.wikisource.org/wiki/Index:H.R.\\_Rep.\\_No.\\_94-1476](http://en.wikisource.org/wiki/Index:H.R._Rep._No._94-1476)) (last visited April 8, 2010) (emphasis added).

of the Copyright Act “preempts all equivalent state-law rights claimed in any work within the subject matter of copyright.”<sup>141</sup> Thus, while the legislative history shows that Congress was aware of the publicity right and did not wish to quash it completely, there is a clear tension between the right to likeness and copyright. The courts will resolve this tension via preemption when the facts presented indicate that the plaintiff is not attempting to protect his or her likeness, but rather attempting to exert control over the otherwise valid exercise of a copyright.<sup>142</sup>

## VI. COULD COPYRIGHT LAW PREEMPT AN AVATAR’S PUBLICITY RIGHTS CLAIM?

This section discusses whether copyright law could preempt an attempt to enforce a player’s publicity right in his or her avatar. As noted above, the publicity right may be preempted by federal copyright law if the publicity right can be considered as an end-run around an otherwise valid exercise of copyright. To a certain extent, an avatar can be copyrighted as a character. Because the copyright system affords no protection to ideas,<sup>143</sup> copyright does not protect characters that are stock ideas.<sup>144</sup> Copyright protection extends to literary, animated, and illustrated characters in two ways: (1) when the character is sufficiently delineated, and (2) when the character is “the story being told.”<sup>145</sup> In other words, “[t]he less developed the characters, the less they can be copyrighted.”<sup>146</sup> This rule is strictly

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<sup>141</sup> *Baltimore Orioles, Inc.*, 805 F.2d at 676 (quoting H. R. Rep. No. 94-1476, at 131 (1976)).

<sup>142</sup> The above cases seem to indicate that as right to likeness claims move further away from protecting one’s physical likeness and toward protecting other facets of our persona — *e.g.*, vocal likeness — the courts are more willing to find preemption.

<sup>143</sup> “In no case does copyright protection for an original work of authorship extend to any *idea*, procedure, process, system, method of operation, concept, principle, or discovery, *regardless of the form in which it is described, explained, illustrated, or embodied in such work.*” 17 U.S.C. § 102(b) (LexisNexis 2009) (emphasis added).

<sup>144</sup> *Warner Bros. Pictures, Inc. v. Columbia Broadcasting Sys., Inc.*, 216 F.2d 945, 950 (9th Cir. 1954), *cert. denied*, 348 U.S. 971 (1955) (“If the character is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright.”).

<sup>145</sup> *Id.*

<sup>146</sup> *Olson v. National Broadcasting Co.*, 855 F.2d 1446, 1452 (9th Cir. 1988) (quoting *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930)).

applied to literary characters, and less so to animated and illustrated characters because “literary characters are difficult to delineate and may be based on nothing more than an unprotected idea”; however, cartoon characters are distinguishable from literary characters in that they have physical as well as conceptual qualities, and are “more likely to contain some unique elements of expression.”<sup>147</sup> Characters who are sufficiently delineated, and thus protectable under the copyright regime, display “consistent, widely identifiable traits.”<sup>148</sup> With respect to preemption of the publicity right, if a person portrays a character, he or she has no publicity right in that character because the publicity right protects only our own personas, not those personas we adopt.<sup>149</sup>

In many fantasy games such as *World of Warcraft*, characters are limited to variations of stock elements. While the stock elements are numerous, there are still a limited number of combinations to the way a troll hunter or elf warrior may look. While players have numerous customization options, ultimately they are still playing as archetypal characters. While psychology research certainly implies that players create characters to resemble themselves,<sup>150</sup> archetypal characters made up of stock elements make a weak case for copyright. Any copyright in the individual elements that make up the character belong to the game maker. Because these fantasy characters present a weak case for copyright, preemption is not likely to be an issue. Nevertheless, because these characters do not bear a resemblance to their players, it is difficult to say that any likeness of the player exists in the character.

Avatars, on the other hand, can (or will in the future) bear a strong resemblance to their players. As the avatar takes on more individual qualities, it becomes more specifically delineated<sup>151</sup> in that it becomes

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<sup>147</sup> *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1224 (9th Cir. 2008) (citation and internal quotation marks omitted).

<sup>148</sup> *Id.*

<sup>149</sup> *See Stanford v. Caesars Entm't, Inc.*, 430 F. Supp. 2d 749, 756-57 (W.D. Tenn. 2006) (citations omitted) (holding that plaintiff could not claim publicity right over dramatic portrayal of fictional character).

<sup>150</sup> *Bessiere et al.*, *supra* note 57, at 531.

<sup>151</sup> For most games, the characters and avatars are not “the story being told.” While characters and avatars are certainly participants in an epic story or society, there is no story being told in MMORPGs. Rather, each player is given the choice as to how he or she will participate in the virtual world, whether it be through quests and narrative, or hunting down weaker players.

uniquely identifiable from other avatars. When such a strong resemblance becomes possible, there is a stronger case that the avatar is copyrightable as a character. Under current MMORPG TOS and EULAs, the game makers hold copyright in all avatars. In such cases, a claim for a violation of publicity rights against a game maker resembles cases such as *Toney v. L'Oreal USA, Inc.*<sup>152</sup>— i.e., an individual alleges misuse of his or her likeness in a copyrighted work against the copyright holder. At this point, the jurisdiction's precedent in such cases will be a deciding factor as to whether any publicity rights held by the player are preempted by copyright law. It is ironic that as a player's publicity rights become stronger— as player begins to resemble his or her avatar— so to do the gamemaker's copyright interests in the avatar.

However, a second possibility is that as avatars approach photorealism, they may no longer be subject to copyright. Copyright, after all, rewards a creative act. As avatar graphics approach reality, they are no longer products of the game maker's creative act; rather, they are the works of the players themselves who either upload their likenesses or construct it through the program.<sup>153</sup> When this type of realism is possible, the game maker's copyright over avatars can be seriously questioned, and players can make strong publicity rights claims to prevent commercial use of their avatars.<sup>154</sup>

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<sup>152</sup> 17 U.S.C. §101 (LexisNexis 2009); *Toney*, 406 F.3d at 910.

<sup>153</sup> At this point, avatar creation will only be facilitated by the game software—i.e., as avatars become more customizable, they are no longer made up of stock parts, each of which is copyrighted by the game makers. Rather, avatars will be a series of precise decisions regarding skin tone, nose angle, hair cut, etc., made entirely by the player.

<sup>154</sup> Until this time, other legal remedies may be available to players in the form of federal regulations of deceptive practices. Section 5 of the Federal Trade Commission Act prohibits, *inter alia*, “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a)(1) (LexisNexis 2009). An act or practice is deceptive if (1) there is a representation, omission, or practice that (2) is likely to mislead consumers acting reasonably under the circumstances, and (3) the representation, omission, or practice is material; deception may be “based on the ‘net impression’ created by a representation.” *FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009) (citations omitted) (finding defendants' advertising was deceptive in that it led consumers to believe that they could make \$10,000 per month while working five to ten hours per week); *FTC v. Peoples Credit First, LLC*, 244 Fed. Appx. 942, 944 (11th Cir. 2007). Section 5 does not create a private right of action; it is only enforceable by the FTC. *Helms v. ConsumerInfo.com, Inc.*, 436 F. Supp. 2d 1220, 1235 n.19 (D. Ala. 2005) (citations omitted).

Under section 5, courts have found that software that invades a computer without providing benefit is a deceptive practice. *FTC v. Seismic Entm't Prods.*, No. 04-377-JD, 2004 U.S. Dist. LEXIS 22788, at \*8-12 (D.N.H. Oct. 21, 2004). The Act likely gives the

## VII. CONCLUSION

In laying out the background of the current state of law surrounding the publicity right and its interaction with copyright law, this note seeks to divine the future of the tort as it relates to online privacy in MMORPGs. In such games, most people play characters and not themselves. However, with games such as *Second Life* and *The Sims Online*, there is a clear movement towards games in which players can play as themselves. Industry standards currently demand a waiver of the right to a player's likeness in characters before playing the game. Given the ease with which intimately personal information is collected online and the targeted advertising that the internet specializes in, the waiver of the right to publicity is worrisome. This is one of many concerns in the arena of online privacy. It has not yet manifested as a problem, but gaming technology, just as social networking, is quickly outpacing the law. This is certain to become a problem. Currently, the virtual communities in which players extend their virtual selves are almost exclusively for gaming. However, it is not difficult to imagine opening virtual universities and virtual offices using the platforms similar to MMORPGs. As the lines between the virtual self and actual self begin to blur, the private ownership of the virtual world will certainly implicate individual privacy rights.

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FTC the power to regulate contracts of adhesion and contracts with unconscionable terms under section 5. See *American Financial Services Asso. v. FTC*, 767 F.2d 957, 982-983 (D.C. Cir. 1985). As of July 2009, no case has applied section 5 of the FTC Act to contracts similar to those addressed in this note, such as terms of service or end-user license agreements. However, the argument for applying section 5 to commercial use of an avatar's likeness would likely be as follows: players play games expecting their game licenses to extend to them reasonable control over their characters as they progress in the virtual world. That the game maker might use a person's avatar for commercial advantage seems to be well outside the scope of what is expected by most players who are deeply attached to their avatars and characters. Any wide-scale, commercial abuse of avatar likeness is deceptive given (1) the players' personal relationships to their avatars, (2) the openness of the virtual world created by the game makers, and (3) the fact that players assume that when an avatar speaks, it is speaking for the player, and not the game makers.